In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 370

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL., PETITIONERS

v.

THE PHILIP CAREY MANUFACTURING COMPANY, MIAMI CABINET DIVISION, AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

This is a companion case to *The Philip Carey Manufacturing Company* v. *National Labor Relations Board, et al.*, No. 366, this Term. The petition in No. 366, filed by the Company, challenges the portion of the Board's order which was enforced by the court below.[1] The present petition, filed by the Union, chal-

[1] The Board found, *inter alia*, that the Company bargained in good faith from the start of contract negotiations until December 28, 1960, when it violated Section 8(a)(5) of the Act by insisting to an impasse upon a proposal to give strike replacements superseniority. This unfair labor practice, the

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lenges the Board's finding that the refusal to bargain did not occur until December 28, 1960, and the action of the court below in declining to enforce the Board's bargaining order (see n. 1, *supra*). The Board has filed an opposition to the petition in No. 366. The Board's position with respect to the present petition is as follows:

1. The Union contends (Pet. 14–18) that the refusal to bargain occurred on July 28, 1960, when the Company submitted its "final offer," or on September 26, 1960, when it first interjected the superseniority issue, rather than on December 28, 1960, as the Board found. This issue involves essentially an evaluation of the facts of this particular case, a task committed largely to the discretion of the Board with primary responsibility for review of the administrative determination in the court of appeals. Here the Board was fully justified in concluding that the refusal to bargain did not occur on July 28, 1960. As the court below pointed out (Pet. 33): "July 28 was the eleventh meeting between the parties and the Company was entitled to take a definite position at that time. The proposed contract contained a number of improvements over existing benefits and was the

Board concluded, converted the Union's economic strike, which had begun on September 6, 1960, into an unfair labor practice strike as of December 28 (Pet. 20–23). The Board ordered the Company to reinstate the unfair labor practice strikers, with backpay from the date of their unconditional offer to return to work, and to bargain with the Union upon request (Pet. 25–26; J.A. 64a, 67a). The court of appeals upheld the Board's findings and enforced its order except insofar as it required the Company to bargain with the Union (Pet. 32–39, 48–50).

biggest economic package offered by the Company at any of its seven other plants in the United States * * *. Furthermore, there were eleven more meetings between July 28 and the date of the strike." And, insofar as the superseniority issue is concerned, even if the mere proposal of superseniority constituted an unfair labor practice, this would have no practical significance on the reinstatement rights of the strikers.

The commission of an unfair labor practice does not automatically convert an economic strike into an unfair labor practice strike; the conversion occurs only when it appears that the unfair labor practice has prolonged the strike. As the Board found (Pet. 22–23, n. 5), "there is no suggestion in the record that the strikers, who struck originally for economic purposes, changed their objective as a result of the September 26 letter. * * * [I]t was only after the December 28 impasse in collective bargaining that the [Company's] proposal became an insuperable obstacle to settlement of the strike."

2. The court below, although sustaining the Board's finding that the Company violated Section 8(a)(5) of the Act, on and after December 28, 1960, by insisting on superseniority for employees who worked during the strike, declined to enforce the Board's bargaining order. The court reasoned that, since the unlawful refusal to bargain did not occur until the last two and a half months of the certification year, by which time the Union had apparently lost its majority among the employees, and since the Company, after withdrawal of its superseniority proposal in August 1961, met twice with the Union without result,

it would not effectuate the policies of the Act to require the Company to continue bargaining with the Union (Pet. 49–50).

The Board, in agreement with the Union (Pet. 10–14), believes that the court below erred in declining to enforce the Board's bargaining order. Due to the refusal to bargain on December 28, 1960, the Union was denied its statutory right to act as the employees' bargaining representative for a full 12-month period after it has been certified (see *Brooks* v. *National Labor Relations Board*, 348 U.S. 96). Nor was it proper to regard the bargaining which occurred after the withdrawal of the superseniority proposal as "curing" the lapse in December 1960. For in the subsequent bargaining the Company, although withdrawing its illegal superseniority proposal, continued to insist that strikers who had been permanently replaced were not entitled to be reinstated to their former status (J.A. 52a–53a), a condition which cannot properly be imposed with respect to unfair labor practice strikers.[2]

The Board did not file a petition for certiorari on this question, however, since the ruling of the court below appeared to turn upon the facts of this particular case, and therefore not to present an issue of sufficient importance to warrant review by this Court. But, if the Union's petition on the bargaining order

[2] The Board pointed this out to the court below in a petition for rehearing, which was denied without opinion.

question is granted, the Board will participate in the defense of its order.

Respectfully submitted.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 370

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO AND ITS LOCAL 689,

Petitioners,

v.

THE PHILIP CAREY MANUFACTURING COMPANY, MIAMI CABINET DIVISION, AND NATIONAL LABOR RELATIONS BOARD,

Respondents.

BRIEF OF THE PHILIP CAREY MANUFACTURING COMPANY (MIAMI CABINET DIVISION), RESPONDENT, IN OPPOSITION TO THE APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED BY THE PETITIONERS, INTERNATIONAL UNION UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO, AND LOCAL 689 THEREOF

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QUESTIONS PRESENTED

The statement of "Questions Presented" appearing on pages 2-3 of the Petitioners' application is argumentative

and inaccurate. It is submitted that the following statement is more accurate and appropriate:

(1) Did the NLRB and Court of Appeals err when they found that the Respondent bargained in good faith until December 28, 1960, and concluded that the Union's strike, which began September 6, 1960, was an economic strike in its inception and did not become an unfair labor practice strike until December 28, 1960?

(2) Did the Court of Appeals err in declining to enforce a NLRB order directing the Employer, after the expiration of the certification year, to continue to bargain with a union that had lost its majority through no fault of the Employer?

STATEMENT OF THE CASE

There is now pending before this Court a petition for writ of certiorari (No. 366) filed by this Respondent presenting only the question of, "Whether the National Labor Relations Board violated Section 10(b) of the Act (29 U.S.C. § 160(b)) by issuing its complaint and decision and order against the Petitioner." In that petition this Respondent did not ask this Court to review any of the questions raised by the petitioning Unions in the instant petition.

Unfortunately, the Statement of the Case summarized on pages 3-10 of the instant petition contains many inaccuracies. Only three examples are set forth below:

(1) There is no basis for the statement on page 4 that,

> "From April 18 to July 28, there were ten bargaining sessions. (R. 17) These consisted largely of the UAW's presentation and support of its demands. Apparently, no progress was made during this period, except on the subject of a grievance procedure." (R. 18)

The Board itself has found that from April 18 to July 28 there were eleven—not ten—bargaining meetings, and that at these meetings the Respondent "considered the Union's proposals" and "made counterproposals." At the eleventh bargaining meeting the Respondent "made a complete contract proposal which it described as a final offer to end negotiations and its best offer to avoid a strike." (JA 3a)

The Trial Examiner found that at the meeting on May 16, 1960, "the Union submitted a proposed contract" and that,

> "The various provisions were discussed in a series of meetings in June and July, during which agreement was reached on a few issues, notably an elaborate grievance and arbitration procedure, and the area of disagreement was narrowed with respect to some minor matters." (JA 18a)

He also found that the Respondent's contract proposal of July 28th "contained a number of improvements in existing benefits" and detailed seven of these, including a general increase and monetary fringe benefits estimated to amount to 9¢ per hour. (JA 18a-19a) Surely this constituted "progress."

(2) The Petitioners' reference to "the Employer's refusal to make or consider any concessions" after July 28, 1960, is incorrect. (Petition, page 6) The Board found that "From July 28, when this proposal was made, to September 6, when the strike began, there were seven meetings," and that during this time "the Respondent did make minor changes in certain respects" although it did not alter its proposal "in the respects the Union found objectionable." (JA 4a)

The Trial Examiner himself expressly found that, at the bargaining meeting on August 16th,

> "The Respondent offered to modify its proposal regarding layoff procedure so as to provide that a laid-off employee could exercise his 'bumping' rights on a plantwide basis after 7 days, instead of after 2 weeks as previously proposed." (JA 24a)

This was an important issue in the negotiations.

The Petitioners themselves admit that at a meeting subsequent to July 28th, which occurred on August 31, 1960, the Respondent "did offer to restore *all* past practices." (Petition, page 5, footnote 2; JA 473a-474a) On this subject, the Trial Examiner found that the Respondent's bargaining representative, at the meeting of August 31st,

> ". . . attempted unsuccessfully to settle the dispute over accumulation of seniority and temporary transfers by offering to revert to past practices in those areas if the Union would agree to retention of past practices in all other areas." (JA 37a)

In footnote 2 on page 5, the Petitioners erroneously state that this proposal of August 31st "would have left the employees exactly where they would have been had they voted against the UAW." Fasold, the Respondent's negotiator, made it clear that he was not proposing to "go back to the old wage rates" (JA 474a), and the Trial Examiner has found that if this proposal had been accepted the "gain to the employees emerging from the bargaining would have been the 9-cent economic package." (JA 37a-38a)

(3) The statement of the Petitioners, on page 4, that the Respondent's July 28th "economic package was unrelated to the demands of the UAW," which is repeated in substance elsewhere in the petition, has no foundation in the record, and is inaccurate. Indeed, the Petitioners have made no citation to the record in support of this erroneous statement. The Union's written demands were presented

to the Respondent on May 16, 1960 (JA 135a), and are contained in Respondent's Exhibit 2. The Union demanded a wage increase, seniority, a grievance procedure, arbitration, a check-off of dues, holiday pay, vacations and other customary subject matter of collective bargaining agreements. Provisions covering all of these subjects were contained in the July 28th proposal which was, therefore, clearly "related to" the demands of the UAW. (Resp. Ex. 6)

REASONS FOR DENYING THE WRIT

1. The Court of Appeals Did Not Err in Sustaining the Decision of the Board That the Respondent Bargained in Good Faith Until December 28, 1960.

The Unions' petition for certiorari presents the basic question of whether the Court of Appeals for the Sixth Circuit erred in sustaining the decision of the Board that the Respondent bargained in good faith with the Unions before December 28, 1960. In *NLRB* v. *Pittsburgh Steamship Co.* (1951) 340 U.S. 498; 95 L.E. 479, at pages 502-503, this Court summarized the standards applicable to this Court and to the Courts of Appeals under the 1947 amendments to Sections 10(e) and (f) of the Act in the following language:

> "Were we called upon to pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. 'The jurisdiction of the court [of appeals] shall be exclusive and its judgment and decree shall be final except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ

of certiorari. . . .' Taft-Hartley Act § 10(e), 61 Stat. 148, ch 120, 29 USC (Supp III) § 160(e). Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' Layne & Bowler Corp. v. Western Well Works, 261 US 387, 393, 67 L ed 712, 714, 43 S Ct 422; Revised Rules of the Supreme Court of the United States, Rule 38 (5). The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues.

"This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.'"

Likewise, in *Universal Camera Corp.* v. *NLRB* (1951), 340 U.S. 474, the Court stated:

"Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only

in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

In the instant case, the Board, after thorough review of an extensive record, found as matters of fact that:

(a) "After the Union's certification on [March] 17, 1960, the parties engaged in extensive bargaining. Meetings began on April 18 and on July 28, at the eleventh meeting, the Respondent, after having considered the Union's proposals and having made counterproposals, made a complete contract proposal which it described as a final offer to end negotiations and its best offer to avoid a strike."

(b) "From July 28, when this proposal was made, to September 6, when the strike began, there were seven meetings. During this time, although the Respondent did make minor changes in certain respects, it did not alter its proposal in the respects the Union found objectionable."

(c) "The Respondent's proposal [of July 28] came at the eleventh meeting between the parties, it did offer a wage increase, and it does not appear to us in the circumstances to be an indication of a failure to bargain in good faith."

(d) "Nor do we think that Humphrey's refusal to meet with Ross alters the case. The Respondent had entrusted its negotiations to both a corporate officer, Fasold, who specialized in such matters, and to Evans, the plant manager, its highest official on the scene, whose competence is not questioned, and whose authority was certainly as broad as that of Ross. In such circumstances we cannot attach any significance to the refusal of the Respondent to depart from its customary procedures." (JA 3a-5a)

In reviewing the above decision at the request of the Petitioners, the Court of Appeals for the Sixth Circuit stated:

> "We find that the holding of the Board on this question is supported by substantial evidence on the record and that the holding of the Trial Examiner was erroneous. As the Board pointed out, July 28 was the eleventh meeting between the parties and the Company was entitled to take a definite position at that time. The proposed contract contained a number of improvements over existing benefits and was the biggest economic package offered by the Company at any of its seven other plants in the United States, as set forth above in more detail. Furthermore, there were eleven more meetings between July 28 and the date of the strike.
>
> "We therefore approve the holding of the Board that the Company did not exceed the limits of permissible bargaining by adhering substantially to its July 28 proposal and that the Company continued to bargain in good faith from July 28 to the time of the strike on September 6. From this conclusion it necessarily follows, as found by the Board, that the strike was an economic strike in its inception." (Petition, page 33)

Applying the standards enunciated in *Pittsburgh Steamship Co.*, and *Universal Camera*, *supra*, it seems evident that the court below made "a fair assessment" of the record on which the Board arrived at its decision, and found that the decision was supported by substantial evidence on the record considered as a whole. Accordingly, this Court should "leave undisturbed, by denying certiorari," the decision of the Court of Appeals approving the good faith bargaining of the Respondent.

In finding that the Respondent bargained in good faith, the Board observed that:

> "One need not listen to argument endlessly. There comes a point in any negotiation where the positions of the parties are set and beyond which they will not go. Where that point is obviously depends on all the facts of the case. On the facts of this case we are not

> prepared to say that the Respondent exceeded the limits of permissible bargaining by substantially adhering to its July 28 proposal." (JA 5a)

The Board thus faithfully applied the conclusion of this Court in *NLRB* v. *American National Insurance Co.* (1952), 343 U.S. 395, in which this Court stated, at page 404:

> "Thus it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position. And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."

To the same effect, this Court later stated, in *NLRB* v. *Insurance Agents' International Union* (1960), 361 U.S. 477, at page 487:

> "But it remains clear that § 8(d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements."

The Court continued:

> "It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one. The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. . . . The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the

> Wagner and Taft-Hartley Acts have recognized." (Pages 488-489)

The Court also stated:

> "Thus the Board in the guise of determining good or bad faith in negotiations could regulate what economic weapons a party might summon to its aid [if it could determine what economic sanctions either party could use]. And if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract." (Page 490)

It is interesting to observe that on page 14 of the petition, the Petitioners, criticizing the court's refusal to enforce the Board's bargaining order against the Respondent, express indignation over "the lower court's heavy-handed intrusion into the administrative domain." But the Petitioners also ask this Court to make an "intrusion into the administrative domain" by reversing the determination of the Board that this Respondent bargained in good faith at all times before December 28, 1960.

The Respondent's letter to the Unions dated September 26th (JA 683a-685a), advising the Unions that if agreement was not reached by September 30th, the Company would change its proposal with respect to seniority "so as to give employees who have reported for work and strike replacements special seniority rights for layoff and recall purposes" was protected free speech and could not possibly be regarded as a violation of Section 8(a)(5) of the Act. Likewise, the special seniority proposal given by the Respondent to the Unions on October 7, 1960 (JA 677a-680a) was not itself a violation of Section 8(a)(5) of the Act. *Erie Resistor Corp.* (1963), 373 U.S. 221; 10 L.E. (2d) 308. In footnote 5 in the above case, this Court, in affirming

the Board, noted that it was the "*continued insistence*" of the employer on a superseniority proposal which "constituted a refusal to bargain in good faith under Section 8(a)(5)." (Emphasis added) It is quite evident that the mere proposing of "superseniority" was not itself a refusal to bargain in good faith, violative of Section 8(a)(5).

This is clear from the Board's decision in *Erie Resistor* (1961), 132 NLRB 621, approved by this Court. In *Erie Resistor*, ". . . on May 11, Respondent introduced the subject of superseniority into the discussions, stating that it could sign no contract without some form of superseniority." (132 NLRB 631) During five bargaining sessions after May 11, the employer "proposed several alternative forms of superseniority" and the union "remained adamant in its opposition to superseniority, contending that all strikers would have to be reinstated and the replacements terminated." (132 NLRB 622) At the meeting of May 15th:

> "Union negotiator Collella went so far as to tell Respondent that 'if they dropped the superseniority issue, we had a complete agreement.' However, Respondent at the meeting on May 18 reiterated its position that superseniority was 'something that management people want and we must have.' The Union would not agree to superseniority, and the parties recessed for several days." (132 NLRB 631)

Despite the above, the Board did not find, in *Erie Resistor*, that there was any unlawful conduct by the employer, or that an impasse occurred, until "May 29"—eleven days after management said superseniority was something "we must have"—when the union called a membership meeting "and unanimously resolved to continue striking 'until management stops its unfair labor practice by making us

agree to giving superseniority to the scabs.'" The Board stated, in the opinion approved by this Court:

> "We find, therefore, that the Union's strike, economic in its inception, was *on May 29* converted to an unfair labor practice strike by the Respondent's unfair labor practices, found above. It follows that all strikers not replaced *as of that date* were, under established law entitled to reinstatement as of the date of their unconditional abandonment of the strike." (132 NLRB 632) (Emphasis added)

The above quotations show that the Board and the court below did not depart from previous decisions of this Court in concluding that the strike was not converted to an unfair labor practice strike until December 28, 1960.

2. The Court of Appeals Did Not Err in Declining to Enforce a NLRB Order Directing the Respondent, After the Expiration of the Certification Year, to Continue to Bargain with a Union That Had Lost Its Majority Through No Fault of the Employer.

The court below did not err when it unanimously declined to enforce that part of the Board's order which directed the Respondent to continue to bargain with the Petitioning Unions after they had lost their majority through no fault of the Employer. The Unions were certified on March 17, 1960, following an election which they had won by a vote of 122 to 112. (JA 17a) The strike, which the Unions began on September 6, 1960, was ill conceived, obviously unpopular and unsuccessful. Many employees continued to work or returned to work and also, as shown by Respondent's Exhibit 62 (JA 732a-735a), eighty strikers were replaced before December 28, 1960, "the date on which the Board has found that the strike became an unfair labor practice strike." (JA 9a)

The Trial Examiner has found that as of August 1961, when all remaining strikers applied for reinstatement, there were only 102 strikers who were entitled to reinstatement, even if all replacements had been invalid. (Appendix B to Intermediate Report, JA 69a-72a) 73 of these 102—almost three-fourths of those who remained on strike as of August 1961—had been lawfully replaced and have not been ordered reinstated by the Board. (JA 7a-8a, footnote 7; see lists, JA 10a-11a; JA 69a-70a) This means that only 29 employees entitled to reinstatement out of approximately 234 employees in the bargaining unit were still on strike and supporting the Unions in August 1961. (JA 10a-11a)

In view of the closeness of the original election (a change of five votes would have defeated the Unions), the fact that many employees worked during the strike, and the influx of eighty replacements by December 28, 1960, validly becoming new employees in place of strikers, it is evident that the Unions no longer represented a majority by December 28, 1960, or that there was by that time at least a valid question concerning representation.

It is a matter of record that on March 26, 1962, the Respondent filed a representation petition with the NLRB in Case No. 9-RM-295 asking the Board to resolve any possible question concerning representation by another election in the bargaining unit. On April 4, 1962, the Board dismissed the Respondent's petition, stating:

> "In view of pending cases 9-CA-2192 and 9-CA-2240 [the instant cases] wherein it is alleged you have violated Section 8(a)(5) of the National Labor Relations Act, and in view of the Complaint and favorable Intermediate Report which have issued in these matters, it appears that no question concerning representation could appropriately be raised at this time."

Thus, the Respondent has done everything in its power to make it possible for its employees to resolve any question concerning representation through orderly NLRB representation procedures. An election has been denied solely on the ground of the pendency of the instant case.

The Court of Appeals, observing that the Respondent had "resumed good faith bargaining" on August 10, 1961, and had met twice with the Unions before the hearing began on October 3, 1961, and also observing "the Union's obvious loss of its majority status" concluded that the Board had erred in directing continued recognition by the Respondent of the Petitioners as exclusive bargaining representatives of the employees in the unit. The court stated:

> "In view of the lengthy good faith bargaining which has transpired, the expiration of the certification year, and the Union's loss of its majority status, we hold that the Company is no longer required to bargain with this Union." (Petition, page 50)

It is submitted that the Court of Appeals did not err. Section 7 of the Act, as amended in 1947, specifies that employees shall have the right "to bargain collectively through representatives of their own choosing," but "shall also have the right to refrain from any or all of such activities." To compel the great majority of the present employees of the Respondent to be represented for an indefinite period hereafter by a union which they have either abandoned or not selected, when the Employer was not responsible for the loss of the majority, would make a mockery of the rights of employees which Congress attempted to protect in Section 7. As Judge Friendly stated in *NLRB* v. *Superior Fireproof Door & Sash Co., Inc.* (CA 2; 1961), 289 F. 2d 713, at page 724, cited by the court below:

> "Nor may we forget that the interests to be protected are primarily those of the employees, importantly in-

cluding, of course, their right to effective representation, rather than of the union itself."

The authorities cited by the Petitioners on this point are inapplicable. In all of the cases cited by the Petitioners on pages 10 and 11 of the Petition, the union lost its majority *because of* the unfair labor practices of the employer. Under such circumstances, the Board obviously has a right to fashion the remedy.

In the instant case, the Petitioners lost their majority *before* December 28, 1960, the date on which the Board and the court have found the Respondent violated Section 8(a)(5) of the Act. Also, on August 10, 1961, the Respondent withdrew the special seniority proposal, which the Board concluded was violative of the Act, thus terminating any violation which previously may have occurred. (G. C. Ex. 15; 681a) The Petitioners made no request for a bargaining meeting between December 28, 1960 and August 12, 1961. (JA 725a) Even omitting the period from December 28, 1960 to August 10, 1961, the Petitioners had the opportunity to bargain in good faith with the Respondent for a total period of virtually a year between the date of certification of the Unions by the NLRB on March 17, 1960, and the date of the hearing on October 3, 1961. These are factors which the court had a right to consider in declining to enforce the bargaining portion of the Board's order.

In *Brooks* v. *NLRB* (1954), 348 U. S. 96, cited by the Petitioners, where there had been a complete refusal by the employer to meet with the union, the court observed, at page 104:

> "... the Board has ruled that one year after certification the employer can ask for an election or, if he has fair doubts about the union's continuing majority, he may refuse to bargain with it."

As pointed out above, the Respondent has sought a Board election to resolve the question of representation in its plant. The election has been blocked solely by the pendency of this proceeding. If the Unions still claim to represent employees of the Respondent, the representation facilities of the Board will be available to the unions for the resolution of this question if and as soon as this case is concluded in favor of the Respondent.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari filed by the Petitioners should be denied.

Respectfully submitted,

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September 8, 1964